U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12236516

Date: SEP. 1, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. On appeal, the Petitioner submits a brief asserting that she is eligible for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further review of the record and issuance of a new decision.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or

> who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
>
> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Section 101(a)(32) of the Act provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
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> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

In addition to the definition of "advanced degree" provided at 8 C.F.R. § 204.5(k)(2), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) provides that a petitioner present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

To demonstrate eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[2] grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

A. Eligibility for the Requested Classification

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification. The Director concluded in his denial that the Petitioner qualifies for the requested classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. For the reasons discussed below, we withdraw the Director's conclusion that the Petitioner qualifies for the EB-2 classification.

To begin with, the Petitioner does not claim to be an individual of exceptional ability. Instead, she relies upon her academic records, educational evaluations, and letters to establish that she is an advanced degree professional.

To show that a petitioner holds a qualifying advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, a petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The record contains a copy of the Petitioner's diploma from [redacted] University which "gives the title of Physical Therapist" to the Petitioner, but the document bears no indication that she was awarded a bachelor's degree from that institution.[4] To establish her qualifying work experience she submits letters, such as a letter from a nursing home which states that she was employed there as an intern in 2005, prior to the issuance of her diploma. Additionally, the letter from Dr. M- indicates that she worked as a home care physical therapist from 2011 – 2016, but the record does not establish that Dr. M- was the Petitioner's former employer.

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[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] The Petitioner has not submitted a copy of her academic transcript for her program of study at [redacted] University for USCIS to review.

As discussed, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) specifies that the evidence of progressive experience must be "in the form of letters from current or former employer(s)." Without additional information regarding the Petitioner's duties and periods of employment as a physical therapist from her current or former employer(s), we are unable to conclude that the Petitioner has at least five years of progressive experience as required.

The Petitioner also submitted a "credential evaluation report" from A- which concludes that the Petitioner's foreign degree is equivalent to a U.S. bachelor's degree in physical therapy based on an "Archival Certificate – bachelor of physiotherapy degree and academic records, issued by the Ministry of Education of the Federative Republic of Brazil." Another "opinion letter" from A- asserts the Petitioner "holds a bachelor's degree in Physiotherapy from [redacted] University," and opines that "her qualifying experience and training of 10 years is equivalent to an advanced degree in physical therapy." A- indicates that his evaluation is based on documents provided by the Petitioner. While we recognize that A- may have relied on documents not included in the record, given the diploma and letters that we have reviewed, the basis for his conclusory statements regarding the qualifying nature of the Petitioner's education and work experience has not been substantiated. Accordingly, the Petitioner's reliance on A-'s evaluations is misplaced.[5]

We may, in our discretion, use an evaluation of a person's foreign education as an advisory opinion. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we may discount or give less weight to that evaluation. *Id.*

Moreover, the submitted education evaluation report from the Foreign Credentialing Commission on Physical Therapy (FCCPT) raises additional questions regarding whether the Petitioner's foreign education equates to a U.S. bachelor's degree. FCCPT indicates that [redacted] University sent the Petitioner's official transcripts and course descriptions directly to FCCPT. Based on an analysis of this material FCCPT concludes that the Petitioner's diploma "does satisfy the minimum number of 123 credits that is required for a U.S. bachelor's degree," but notes "the curriculum does not appear to meet the requirements of Florida Rule." FCCPT's determined that the Petitioner's general education "lacks required courses in the following areas and subjects: Humanities." The Petitioner states in response to the Director's request for evidence (RFE) that she is enrolled for the coursework that she is missing. Notably, the record is not supplemented with Florida's academic requirements for physical therapists. Without more, this evaluation does not establish the Petitioner's foreign academic credentials are equivalent to a U.S bachelor's degree. The Petitioner must resolve this ambiguity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Considering the above, the Director should first determine whether the Petitioner has sufficiently demonstrated that she holds the foreign degree equivalent of a U.S. bachelor's degree. If the Director concludes that the Petitioner has provided independent, objective evidence to establish receipt of such

[5] Opinions rendered that are merely conclusory and do not provide a credible roadmap that clearly lays out the basis for the opinions are not persuasive. *See* 9 USCIS Policy Manual F.5, https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-9.

a degree, he should then determine whether the Petitioner has submitted employment letters which establish "at least five years of progressive post-baccalaureate experience in the specialty," as required by the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B).

B. *Dhanasar* Analysis

Regarding the Petitioner's remaining claims of eligibility under the *Dhanasar* analysis, we agree with the Director's ultimate conclusions. For example, concerning the national importance portion of the first prong, although the Petitioner's statements reflect her intention to continue working in her field in the United States, she has not offered sufficient information and evidence to demonstrate that the prospective impact of her proposed endeavor rises to the level of national importance. In *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893. Similarly, the record in this matter does not demonstrate that the Petitioner's proposed endeavor stands to sufficiently impact U.S. interests or the health industry more broadly at a level commensurate with national importance. In addition, she has not demonstrated that her specific proposed endeavor has significant potential to employ U.S. workers or otherwise offer substantial positive economic effects for our nation.

III. CONCLUSION

For the reasons discussed above, we are remanding the petition for the Director to consider anew whether the Petitioner qualifies for EB-2 classification, the threshold determination in national interest waiver cases. The Director may request any additional evidence considered pertinent to the new determination.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis and entry of a new decision.